

ADVISORY COMMITTEE’S RECOMMENDATION

Recommendation: FAVORABLE ACTION on Warrant Article 24 by a vote of 11-6-4.

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| Executive Summary | <p>Effective 2021, the Massachusetts legislature amended Mass. Gen. Laws Chapter 40, Section 3A, to require “MBTA communities” such as Brookline to create at least one zoning district of “reasonable size” within 0.5 miles of a transit station that permits multi-family housing as of right. Known as the “MBTA Communities Act (“MBTACA”, or “Act”), the Act directed the State’s Department of Housing and Community Development (“DHCD”) to “promulgate guidelines” detailing criteria for its determination of compliance. DHCD’s MBTACA guidelines require compliance by December 31, 2023, the end of this year. (As of this writing, DHCD has not responded to the Select Board’s March 28, 2023 request for a longer timeline and certain substantive changes to the guidelines).</p> <p>As of this writing, the Planning Department’s proposal for compliance is through zoning changes in the vicinity of the Town’s Harvard St. corridor, with a stated goal of publicly releasing a draft warrant article in late June 2023, and of filing a final article in early September deadline for the November 2023 Special Town Meeting.</p> <p>The Petitioners’ resolution asks for a Moderator’s Committee to “identify additional potential options” for compliance with the Act beyond the Planning Department’s current proposal, with Planning Department staff and other support.</p> <p>On April 18, 2023, the Select Board appointed a committee of its own charged with identifying, developing and analyzing options to the Planning Department’s Harvard St. proposal. The Select Board committee’s roster includes Article 24 Co-Petitioner Richard Benka (Chair) and Co-Petitioner Linda Olson Pehlke. For further information, see the Select Board’s April 18 charge and slate. (Item 16A, pp. 456-457)</p> |
| Voting Yes will... | Ask the Moderator to appoint a Moderator’s Committee with Planning Department staff support that will “identify additional potential options” to the Planning Department’s current proposal for timely compliance with the MBTACA. |
| Voting No will... | Refrain from asking the Moderator to appoint such a committee. |

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| <p>Financial impact</p> | <p>There are no direct costs associated with the appointment of a volunteer Moderator’s Committee. There could be burdens on Planning Department staff resulting from such an appointment, particularly given the April 18, 2023 appointment of the Select Board’s committee and the need for Planning Department support of both committees (since the options review each would be undertaking requires access to the State’s electronic compliance model). In addition, the Act includes a sanction for non-complying communities consisting of the loss of certain funding, which, in the Town’s case, would mean loss of approximately \$225,000 in Local Capital Projects funding for the Brookline Housing Authority (BHA). In addition, DHCD’s Guidelines state that it and other state agencies may consider a community’s non-compliance in making discretionary decisions on grant applications or funding.</p> |
| <p>Legal implications</p> | <p>There are no direct legal implications posed by the establishment of a Moderator’s Committee. On March 15, 2023, the Massachusetts Attorney General released written MBTACA Guidance stating that non-complying communities may be “subject to civil enforcement action” by the AG. In a memorandum dated March 3, 2023, Town Counsel identified legal risks posed by failure to timely comply. The memorandum states that the remedies a judge could order for noncompliance include the imposition of a compliant zoning district on the Town, as well as an award of attorneys’ fees/costs to any prevailing plaintiff in a civil lawsuit.</p> |

Introduction

Petitioners Neil Gordon, Richard Benka, John Doggett, Jane Gilman, Nancy Heller, Jonathan Margolis, Linda Olson Pehlke, and Marty Rosenthal filed Warrant Article 24, which asks the Moderator to appoint a committee to “identify potential options” to the Planning Department’s current proposal for compliance with the December 31, 2023, deadline. That deadline is established by the Guidelines of the Massachusetts Department of Housing and Community Development (“DHCD”) that DHCD implemented pursuant to the MBTA Communities Act (“Act”, or “MBTACA”), Massachusetts General Laws Chapter 40A, Section 3A. Currently, the Planning Department’s proposal focuses on the Harvard St. corridor. Extensive background information, including but not limited to the foregoing and following, is available on the Town’s website entitled “Multi-family Zoning Requirements for Compliant MBTA Communities”.

A. The MBTA Communities Act and the DHCD Guidelines

Section 18 of “An Act Enabling Partnerships for Growth”, 2020 Mass. Acts ch. 358, created a new Section (“s.”) 3A of the State’s Zoning Act, Massachusetts General Laws (“MGL”) Chapter 40A. Section 3A requires “MBTA communities” such as Brookline to create at least one zoning district of “reasonable size” within 0.5 miles of a transit station that permits multi-family housing as of right. The Act directed the State’s Department of Housing and Community Development

(“DHCD”) to “promulgate guidelines” defining when a community is in compliance. DHCD’s Guidelines list some of their guiding principles. These include that communities benefiting from having the State’s transit network within their borders have an obligation to facilitate the creation of denser housing around those transit stations, and that generally, multi-family housing should be facilitated in locations with easy access to transit stations for pedestrians and bicyclists.

According to the Guidelines, the Act does not require actual housing production; it only requires that a community create a zoning district where it is possible and permissible to build “multi-family housing”.

The State Zoning Act defines “multi-family housing” as buildings with at least 3 units, or lots with at least two buildings, each building having at least 2 units. (MGL c. 40A, s. 1A). The Act and DHCD’s current iteration of the Guidelines together establish complex and detailed parameters for Brookline’s MBTACA-compliant district that include the following requirements:

- The zoning district must permit “multi-family housing” as of right; the zoning district’s rules may not condition a multi-family housing project on approval through discretionary decision-making such as a special permit process. (MGL s. 40A, s. 3A; Guidelines, s. 4)
- The Town may not impose zoning requirements on the multi-family housing zoning district that it does not generally impose on other uses (e.g., single and two-family residential), such as required ground-floor retail. (Guidelines, s. 4C)
- A “reasonably sized” zoning district must be of “neighborhood scale”; based on its “developable land”, Brookline’s zoning district must be at least 41 acres in size (1.5% of “developable land”). (Guidelines, s. 5(a) and App. 1 p. 1).
- 90% of this zoning district must be within 0.5 miles of an MBTA stop. (Guidelines, s. 8, App. 1 p. 1)
- At least 50% of the zoning district’s land area must be comprised of contiguous lots. (s. 5)
- If in more than one area, each portion of the zoning district must be at least 5 acres in size. (s. 5)
- The required minimum density of the zoning district is 15 units/acre. (MGL c. 40A, s. 3A) Non-residential uses (such as parking) **are counted** toward the density calculation, except for rights of way and public land for non-residential uses. (Guidelines, s. 6(a)) Municipalities may establish sub-districts with different density requirements so long as the district as a whole supports a density of 15 units/acre. (Guidelines, s. 6(b))
- The zoning district’s required multi-family unit capacity is 6,990 housing units (25% of the Town’s 27,961 housing units counted in the 2020 US Census). (Guidelines, s. 5(b) and App. 1 p. 1) This is theoretical capacity only; the zoning rules must allow for the production of this number of units by right on the 41 acres, but DHCD does not require any housing production at all. Moreover, the Guidelines ignore the actual existence of housing and treat land theoretically as undeveloped. (Guidelines, s. 5(b)).

- The Town may have a sole zoning district of less than 5 acres that is compliant with the unit capacity and density requirements if it is comprised of entirely contiguous lots. (Guidelines, s. 5(a))
- Units that count toward compliance may not have age or size restrictions, and they may not cap the number or size of bedrooms or the number of occupants. (Guidelines, s. 7)

By December 31, 2023, the Town must demonstrate compliance through a unit capacity count and GIS “shapefile” for the zoning district, using DHCD’s electronic compliance model. DHCD’s compliance model uses the Town Assessor’s geospatial tax parcel data hosted by MassGIS and reflects any excluded land area and local regulatory and dimensional features that impact unit capacity. (Guidelines, s. 9, App. 2) The Town must also provide proof that, at a minimum, the Town Clerk has submitted the zoning district to the Attorney General for approval, and it must provide a certified copy of the Town’s Zoning By-Law.

Following compliance, the Town must continue to notify DHCD of any proposed or enacted zoning change affecting the multi-family housing district, and of any local rule that limits multi-family housing development within it. The Guidelines list a host of factors that could prompt DHCD to rescind the determination of compliance, including zoning action that “materially alters” the zoning district’s land area or unit capacity. (Guidelines, s. 10)

B. Town’s Recent Compliance Steps

Please see the Town’s website for a more complete description of Town staff’s and volunteer board’s work related to achieving MBTACA compliance to date.

Briefly, in late 2022, the Planning Department released its initial compliance proposal that focuses on the Harvard St. area with form-based zoning. In January 2023, some members of the community voiced written concerns to the Select Board about an MBTACA compliance approach that focused on Harvard St.

In April, the Planning Department is holding/has held three public meetings to educate the public about the MBTACA requirements and to seek public input and discussion about alternatives to the Harvard St. proposal, with recordings and slides posted on the Town website. The Planning Department is to report back to the Select Board about these discussions at the Select Board’s April 28, 2023, meeting. On March 28, 2023, the Select Board wrote to DHCD asking for certain clarifications about and changes to the Guidelines, and asking for a phased-in and extended timeline for compliance through the end of 2026.

On April 18, 2023, the Select Board appointed a committee charged with reviewing alternatives to the Planning Department’s Harvard St. proposal. The Select Board committee members include Article 24 Co-Petitioners Richard Benka (as Chair) and Linda Olson Pehlke. For further information, see the Select Board’s April 18, 2023, charge and slate.¹

C. The Housing Choice Act and Simple Majority Zoning Bylaw Approval

¹ The Select Board committee [roster](#) consists of: Richard Benka, Chair; Linda Olson Pehlke; David Pollak; Ken Lewis; Rick Fredkin; Neil Wishinsky; Carol Gladstone; and Katha Seidman.

Section 19 of same 2021 legislation that enacted the MBTACA, which is separately known as the “Housing Choice” act, amended Section 5 of Chapter 40A to provide for Town Meeting approval of a zoning bylaw by a **simple majority** in certain circumstances.

As amended by the Housing Choice act, Section 5 now allows for simple majority approval where a zoning provision permits specified housing by right, including:

- “multi-family housing” (see above definition) or mixed use (defined as residential and non-residential uses in the same development) in “eligible locations”, and
- accessory dwelling units.

State guidance under the Housing Choice legislation defines “eligible locations” to presumptively, but not exclusively, include areas within 0.5 miles of a transit station.² The State’s website on the Housing Choice legislation describes a mechanism for a community to seek an advisory opinion on “eligible locations” and provides a detailed guidance document on the Housing Choice act.

Section 5 also now allows for simple majority approval for certain other zoning by-law measures allowed by special permit, including reductions in the amount of required parking for housing or mixed-use development.

Section 5 contains an important caveat to the above, namely, that a zoning provision that “requires a simple majority vote shall not be combined with [a provision] that requires a two-thirds majority vote.”

Discussion

At the April 10, 2022, Subcommittee’s hearing/meeting, several of the Co-Petitioners explained the reasons for Article 24. Some of their major points were that Harvard St. is a poor choice for MBTACA compliance because it is a commercial corridor and the DHCD guidelines do not permit zoning rules requiring ground floor retail. They expressed concern that zoning rules that permit construction of buildings without ground floor retail could threaten existing businesses and inhibit the corridor’s economic vitality. Planning Director Kara Brewton did not express a view of Article 24, except to add that the State is willing to pre-review (before Town Meeting) a proposal, but that it must have received Select Board sign off. (For a more complete account of the Co-Petitioners’ remarks and of the hearing, please see the Subcommittee’s report to the full Advisory Committee.)

The full Advisory Committee’s April 20, 2022, meeting included a discussion with Co-Petitioners Linda Olson Pehlke and Neil Gordon concerning whether the Co-Petitioners intended to move Article 24, given the Select Board’s creation of an “alternatives” committee and Co-Petitioner Pehlke’s participation in it (along with Co-Petitioner Richard Benka, Chair).

Co-Petitioner Gordon said that a Moderator’s Committee could be redundant of the Select Board committee. He added that had the Moderator appointed the slate of individuals who are on the

² Section 1A of the State Zoning Act defines “eligible locations” to also include “areas of concentrated development” such as town centers and commercial districts.

Select Board committee, the Co-Petitioners would have been happy with the membership. He said that the Co-Petitioners are happy with the Select Board's charge.

Co-Petitioner Pehlke said that she is not sure that all of the Co-Petitioners would agree with Mr. Gordon. She said that she had a slight concern about a comment she heard from the Town Administrator that seemed to contemplate that just one proposal would come out of the Select Board committee, when the Co-Petitioners envisioned the possibility of more than one. She agreed that there was no need for redundant efforts, but given the uncertainties, she could not say with certainty that none of the Co-Petitioners would want to move the Article. Mr. Gordon added that a non-Petitioner would also be free to move the Article.

In response to a committee member's question, Planning Director Brewton stated that the Town will be able to change the MBTACA zoning that Town Meeting approves in the fall, so long as the Town's zoning remains compliant. She also expects DHCD to modify its guidelines over time, as it has with other new laws. In response to another question, she said that the Housing Choice Act permits a majority Town Meeting vote when a zoning measure facilitates the creation of multi-family housing. Other types of zoning changes would require the usual two-thirds Town Meeting vote. Town Counsel will be consulted for advice on the quantum of the vote needed for any future proposed changes to the Town's MBTACA-compliant zoning bylaw.

Comments in support of the minority position favoring no action on Article 24 included the following:

- It would be counter-productive to have dueling committees.
- Expressed high satisfaction with the roster of the individuals appointed to the Select Board committee and the range of views they will represent.
- Town Meeting's role is to vote up or down the executive branch's proposal. Glad that the executive stepped up and addressed concerns by appointing a Select Board committee.

Comments in support of the majority position for favorable action on Article 24 included:

- Expressed unhappiness with some of the individuals appointed to the Select Board committee.
- The Town Administrator attempted an end run to avoid a Town Meeting discussion by trying to make it moot. The Article should go to Town Meeting for its consideration and discussion.
- The executive was attempting to cut Town Meeting out of the discussion, which is not appropriate given the many interests at stake.

The recording of the Advisory Committee's April 20, 2023, 7 pm meeting and vote can be found here: [Advisory Committee Hearing and Meeting - Zoom \(zoomgov.com\)](#).

Meeting materials, including the Subcommittee's report to the full Advisory Committee (on Land Use, Zoning and Sustainability) detailing its April 10, 2023, public hearing and Q&A with the Co-Petitioners, can be found here.

Recommendation

By a vote of 11-6 with 4 abstentions, the Advisory Committee voted FAVORABLE ACTION on Article 24.

ARTICLE 24 ADVISORY COMMITTEE VOTES

| Article Description | MBTACA Resolution |
|---|-------------------|
| AC recommendation (Favorable Action unless indicated) | 11-6-4 |
| Ben Birnbaum | N |
| Harry Bohrs | N |
| Cliff Brown | |
| Patty Correa | N |
| John Doggett | Y |
| Katherine Florio | |
| Harry Friedman | Y |
| David-Marc Goldstein | Y |
| Neil Gordon | A |
| Susan Granoff | A |
| Kelly Hardebeck | |
| Amy Hummel | Y |
| Anita Johnson | N |
| Alisa Jonas | Y |
| Janice Kahn | Y |
| Pam Lodish | Y |
| Joslin Murphy | Y |
| Donelle O'Neal, Sr. | Y |
| Linda Olson Pehlke | Y |
| Markus Penzel | N |
| David Pollak | N |
| Stephen Reeders | A |
| Carlos Ridruejo | |
| Lee Selwyn | Y |
| Alok Somani | A |
| Carolyn Thall | |
| Christine Westphal | |
| Dennis Doughty * | |
| | |
| * Chairperson does not vote except to break a tie | |